UNITED STATES OF AMERICA v. DAVID MATTHEW HICKS	)	**PROSECUTION RESPONSE TO DEFENSE MOTION TO DISMISS ALL CHARGES FOR DENIAL OF FUNDAMENTAL RIGHTS IN CRIMINAL PROCEEDINGS** 18 October 2004

1. Timeliness. This response is being filed within the timeline established by the Presiding Officer.

2. Prosecution Position on Defense Motion. The Defense motion should be denied.

3. Facts.

a. On September 11, 2001, the al Qaida terrorist network used hijacked commercial airliners to attack prominent targets in the United States. Approximately 3,000 people were killed in those attacks.

b. One week later, in response to these "acts of treacherous violence," Congress passed a joint resolution which states, in part, "that the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force ('the AUMF'), 115 Stat 224.

c. On October 7, 2001, the President ordered United States Armed Forces to Afghanistan, with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it.[1]

d. The President issued his Military Order of November 13, 2001 ("Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism").[2] In doing so, the President expressly relied on the authority vested in him as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the AUMF and Sections 821 and 836 of Title 10, United States Code.[3]

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[1] http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html

[2] 66 Fed. Reg. 222 (November 16, 2001)

[3] Sections 821 and 836 are, respectively, Articles 21 and 36 of the Uniform Code of Military Justice ("UCMJ"). These sections provide, in relevant part:

Art. 21. Jurisdiction of courts-martial not exclusive

e. In his Order, the President determined that "[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order . . . to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals."[4]

f. The President ordered, "Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed . . . ."[5] He directed the Secretary of Defense to "issue such orders and regulations . . . as may be necessary to carry out" this Order.[6]

g. Pursuant to this directive by the President, the Secretary of Defense on March 21, 2001, issued Department of Defense Military Commission Order (MCO) No. 1 establishing jurisdiction over persons (those subject to the President's Military Order and alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority)[7] and over offenses (violations of the laws of war and all other offenses triable by military commission).[8] The Secretary directed the Department of Defense General Counsel to "issue such instructions consistent with the President's Military Order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions . . . ."[9]

h. The Accused was captured in Afghanistan on or about December 2001 during Operation Enduring Freedom, and on or about 12 January 2002, U. S. Forces transferred the Accused to Guantanamo Bay, Cuba for continued detention.

g. On February 7, 2002, the President of the United States issued a memorandum in which he determined that none of the provisions of the Geneva Conventions "apply to our conflict with Al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a high contracting party to Geneva." (President's memorandum dated February 7, 2002, attached)

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

Art. 36. President may prescribe rules

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commission and other military tribunals . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

[4] 66 Fed. Reg. 222 (November 16, 2001), Section 1(e).
[5] *I.d.* at Section 2(a).
[6] *I.d.* at Section 2(b).
[7] Militiary Commission Order (MCO) No. 1, para. 3(A).
[8] *I.d.* at para. 3(B).
[9] *I.d.* at para. 8(A).

h. The President determined that the Accused is subject to his Military Order on 3 July 2003.

i. The Appointing Authority approved the charges in this case on 9 June 2004 and on 25 June 2004 referred the same to this military commission in accordance with commission orders and instructions. The case was thereafter docketed to be heard at the U.S. Naval Base at Guantanamo Bay, Cuba.

j. On June 28, 2004, a plurality of the Supreme Court of the United States, in the case of *Hamdi v. Rumsfeld*, held "the capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, 'by universal agreement and practice', are 'important incident[s] of war.'" 124 S.Ct. 2633, 2639 (2004).

4. Discussion

The Defense assertions are unsupported and speculative. The Defense asserts that the Accused's right to an adequate defense *"has been"* violated in three respects. (Emphasis added). First, the Accused has not been given the presumption of innocence. Second, the Accused has not been given adequate facilities for his defense as he has been denied access to counsel at critical points after he was taken into custody by U.S. forces. Finally, the Accused may not be allowed to be present during all phases of his hearing. The arguments of the Defense for each of these claims are speculative and ignore the language and requirements of the President's order and Military Commission orders and instructions.

1. The Accused enjoys the presumption of innocence

The assertion that the Accused has been deprived the presumption of evidence is based on general public statements by the President, Secretary of Defense and other Administration officials to the effect that persons detained at Guantanamo Bay include "killers, terrorists, and bad people." The Defense cites to commentary to the International Covenant of Civil and Political Rights (ICCPR) that it is the duty of public authorities not to prejudge the outcome of a trial. The Defense fails to point out how these public officials have prejudged the outcome of this Commission against this Accused, how the statements offered by the Defense prejudice the Accused, or why such statements require the drastic remedy of dismissal.

Paragraph 5(B) of Military Commission Order No. 1 (MCO No.1) states that the Accused shall be presumed innocent until proven guilty. Paragraph 5(C) of that Order follows with the direction that "[a] Commission member shall vote for a finding of Guilty as to an offense if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense." The remainder of the rights and obligations consistent with the conduct of a full and fair trial follow in paragraph 5. The obligation and duty of the Commission members to consider the guilt or innocence of the Accused based solely of the evidence before them could not be more clear. To assert that the members would forsake their oaths as military officers and as members of the Military Commission because of a few public, political statements by members of the administration is totally unfounded and ignores the unequivocal statements by the Commission members elicited during *voir dire* regarding their understanding of, and commitment to, their duty as members.

Similarly, the rights and requirements in the review process, as well as the obligations and duties of the individuals who will conduct that process, more than provide for a fair process that will protect the Accused's right to a presumption of innocence. As stated in MCO No. 1, once a trial is completed (including sentencing in the event of a guilty verdict), the Presiding Officer must "transmit the authenticated record of trial to the Appointing Authority," id. at § 9.6(h)(1), which "shall promptly perform an administrative review of the record of trial," id. § 9.6(h)(3). If the Appointing Authority determines that the commission proceedings are "administratively complete," the Appointing Authority must transmit the record of trial to the Review Panel, which consists of three military officers, at least one of whom has experience as a judge. Id. § 9.6(h)(4). The Review Panel must return the case to the Appointing Authority for further proceedings when a majority of that panel "has formed a definite and firm conviction that a material error of law occurred." Id. § 9.6(h)(4)(ii); Military Commission Instruction No. 9, Review of Military Commission Proceedings, December 26, 2003, § 4C(1) (hereinafter MCI No. 9). On the other hand, if a majority of the panel finds no such error, it must forward the case to the Secretary with a written opinion recommending that (1) each finding of guilt "be approved, disapproved, or changed to a finding of Guilty to a lesser-included offense" and (2) the sentence imposed "be approved, mitigated, commuted, deferred, or suspended." MCI No. 9, § 4C(1)b. "An authenticated finding of Not Guilty," however, "shall not be changed to a finding of Guilty." MCO No. 1, 32 C.F.R. § 9.6(h)(2). The Secretary must review the trial record and the Review Panel's recommendation and "either return the case for further proceedings or . . . forward it to the President with a recommendation as to disposition," if the President has not designated the Secretary as the final decision maker. MCI No. 9, § 5. In the absence of such a designation, the President makes the final decision; if the Secretary of Defense has been designated, he may approve or disapprove the commission's findings or "change a finding of Guilty to a finding of Guilty to a lesser-included offense, [or] mitigate, commute, defer, or suspend the sentence imposed or any portion thereof."

All the rights set forth above are more than sufficient to protect the Accused's right to the presumption of innocence. The Defense claim that simply because senior members of the Administration have made general public statements characterizing detainees as terrorists in the context of justifying continued detention, the individuals charged with administering the Military Commission Process will forsake their sworn obligations is unsupportable and incorrect.

2. The Accused has been given adequate facilities for his defense

Once again, the Defense chooses to ignore the rights and obligations established by the orders and instructions applicable to Military Commissions, and instead looks to international conventions that do not apply. Under Military Commission procedures a Counsel for the Accused is detailed at the point where the decision is reached that the Accused is to be charged. MCO No. 1, paragraph 5(D) requires that "[a]t least one Detailed Defense Counsel shall be made available to the Accused sufficiently in advance of trial to prepare a defense and until any findings and sentence become final in accordance with Section 6(H)(2)." That provision is entirely consistent with the generally recognized standards for effective assistance of trial. There is no provision in the orders or instructions allowing for the assignment of counsel for purposes of interrogations, nor is it required in order to ensure a full and fair trial. As the Defense notes in its motion, if they believe that something in the interrogation process renders the Accused's statements inadmissible, then the appropriate time to raise that objection is when, and if, the statements are offered by the Prosecution.

The Defense citation to provisions of international conventions is inapposite here, as they do not apply to these military commissions. The inapplicability of the ICCPR is covered in detail in response to other motions in this case, so we will not repeat that same information here. (*See, e.g.*, Prosecution Response to Defense Motion for Dismissal (Lack of Jurisdiction – President's Military Order Violates Equal Protection Clause of the U.S. Constitution)).

As to the Additional Protocols to the Geneva Conventions, the Accused may not claim any protection from them for two reasons. First, as an illegal combatant, the Accused is not entitled to the protections of the Geneva Conventions. Second, the Geneva Conventions do not create privately enforceable rights. As the U.S. Supreme Court recognized in Eisentrager with respect to the 1929 Geneva Convention – the predecessor treaty to the current Geneva Conventions – the "obvious scheme" of the Geneva Conventions is that the "responsibility for observance and enforcement" of their provisions is "upon political and military authorities," not the courts. 339 U.S. at 789. Indeed, the courts are virtually unanimous in the conclusion that the Geneva Conventions are not self-executing. See Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 434, 439 (D.N.J. 1999); see Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808-09 (D.C. Cir. 1984) (Bork, J., concurring) (concluding that the Third Geneva Convention is not self-executing); Huynh Thi Anh v. Levi, 586 F.2d 625, 629 (6th Cir. 1978) (concluding that there is "no evidence" that the Fourth Geneva Convention was "intended to be self-executing or to create private rights of action in the domestic courts of the signatory countries"); Handel v. Artukovic, 601 F. Supp. 1421, 1424-25 (C.D. Cal. 1985) (concluding that the Third Geneva Convention is not self-executing); see also Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442 (1989) (holding that the Geneva Convention on the High Seas, which provides that an illegally boarded merchant ship "shall be compensated for any loss or damage that may have been sustained" does "not create private rights of action" enforceable in United States courts); FTC v. A.P.W. Paper Co., 328 U.S. 193, 203 (1946) (holding that with respect to the Geneva Convention of 1929, the "undertaking 'to prevent the use by private persons' of the words or symbol [of the Red Cross] is a matter for the executive and legislative departments").

This conclusion is supported by the text of the treaties, which contain no explicit provision for enforcement by any form of private petition. Furthermore, the terms of the treaties relating to enforcement focus on vindication by the various diplomatic means available to sovereign nations. See, e.g., Third Geneva Convention, art. 11 (stating that "in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement"); Fourth Geneva Convention, 1956 WL 54810 (U.S. Treaty), T.I.A.S. No. 3365, 6 U.S.T. 3516, art. 12. Put simply, "the corrective machinery specified in the treaty itself is nonjudicial." Holmes v. Laird, 459 F.2d 1211, 1222 (D.C. Cir. 1972). Consequently, the Accused cannot look to the Conventions in order to obtain relief.

3. Absence of the Accused during closed sessions is not violative of a full and fair hearing.

In its final argument, the Defense once again relies on speculation. It is not clear whether there will be any closed sessions in the Accused's trial on the merits that require his absence. The mere possibility that it might occur is an insufficient basis on which to entertain a motion, let alone to grant a motion. Second, the presence of an Accused at all proceedings is not an absolute

requirement in any system and would not necessarily violate the requirement that the military commission be full and fair. For example, it is permissible in U.S. and other national courts, and in international tribunals, to exclude an accused from the courtroom during the presentation of evidence where the Accused is so disruptive as to interfere with the proceedings. Also, it is permissible under the law of the U.S. and other nations, and the international tribunals, to conduct trials without the accused, where the accused has absented himself from the proceedings. The relevant point is that the presence of an accused is not an absolute requirement or right; it can be waived where a strong public policy interest exists. That determination has been made for the Military Commissions by the President in his Military Order, where he deemed the risk to national security too great automatically to allow Guantanamo Bay detainees to be present when classified or other protected information is presented.

As stated above, however, whether that situation exists in the present case is entirely speculative at this point. If, as the trial progresses, it appears that closed sessions may be necessary, the parties and the Commission Members can consider alternatives in the presentment of evidence to ensure that the requirement for a full an fair trial is necessary. As stated by Ambassador Pierre-Richard Prosper, U.S. Ambassador-at-Large for War Crimes Issues during his testimony before the Senate Judiciary Committee, ". . . . there are different approaches that can be used to achieve justice. I recognize that different procedures are allowed and that different procedures are appropriate. No one approach is exclusive and the approaches need not be identical for justice to be administered fairly. But in all approaches what is important is that the procedures ensure fundamental fairness. And that is what the President's order calls for."

5. Oral Argument. The Prosecution requests the opportunity to respond to Defense arguments, if oral argument is granted.

6. Legal Authority.

a. Military Commission Order No. 1, 32 C.F.R. § 9.3(a) (2003)

b. Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004)

c. Johnson v. Eisentrager, 339 U.S. 763 (1950)

c. Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 434, 439 (D.N.J. 1999)

d. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808-09 (D.C. Cir. 1984)

e. Huynh Thi Anh v. Levi, 586 F.2d 625, 629 (6th Cir. 1978)

f. Handel v. Artukovic, 601 F. Supp. 1421, 1424-25 (C.D. Cal. 1985)

g. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442 (1989)

h. FTC v. A.P.W. Paper Co., 328 U.S. 193, 203 (1946)

j. Holmes v. Laird, 459 F.2d 1211, 1222 (D.C. Cir. 1972

7. Witnesses/Evidence. The Prosecution does not foresee the need to present any witnesses or further evidence in support of this motion.

8. Additional Information. None.

//Original Signed//

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Lieutenant Colonel, U.S. Marine Corps
Prosecutor